



## Kentucky Law Journal

Volume 87 | Issue 4

Article 12

1999

# Fixing Rule 1.6: The Montreal Formulation Makes It Work

Melissa Bartlett  
*University of Kentucky*

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Legal Ethics and Professional Responsibility Commons](#), and the [Legal Profession Commons](#)

**Right click to open a feedback form in a new tab to let us know how this document benefits you.**

### Recommended Citation

Bartlett, Melissa (1999) "Fixing Rule 1.6: The Montreal Formulation Makes It Work," *Kentucky Law Journal*: Vol. 87 : Iss. 4 , Article 12.  
Available at: <https://uknowledge.uky.edu/klj/vol87/iss4/12>

This Comment is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact [UKnowledge@lsv.uky.edu](mailto:UKnowledge@lsv.uky.edu).

# COMMENTS

## WORK OF THE AMERICAN BAR ASSOCIATION ETHICS 2000 COMMISSION

### Fixing Rule 1.6: The Montreal Formulation Makes It Work

BY MELISSA BARTLETT\*

#### INTRODUCTION

**A**mong the many concerns which surround the revision of Model Rule 1.6 of the Model Rules of Professional Conduct ("Rule 1.6"), one of the most debated is how to limit disclosure of information under Rule 1.6(b)(1).<sup>1</sup> The debate revolves around which modifier should be used in permitting or mandating disclosure of confidential information to prevent "death or substantial bodily harm."<sup>2</sup> The ABA Ethics 2000 Commission ("Commission"), appointed to draft revisions to the Model Rules,<sup>3</sup> has considered four possible limitation devices. One retains the rule's current use of "imminent" as the modifier

---

\* J.D. 1999, University of Kentucky.

<sup>1</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 Reporter's Observations (A)(2) (Proposed Rule Draft No. 5, 1998).

<sup>2</sup> *Id.* Rule 1.6(b)(1) (1998).

<sup>3</sup> See ABA Establishes "Ethics 2000" to Evaluate Legal Ethics (visited Mar. 19, 1999) <<http://www.abanet.org/media/jul97/eth2000.html>> The ABA's Ethics 2000 Commission is a 10-member Special Committee on the Evaluation of the Rules of Professional Conduct. It was established to examine the ABA Model Rules of Professional Conduct, originally adopted in 1983. See *id.*

for the clause "death or substantial bodily harm."<sup>4</sup> Two alternatives to "imminent" are the use of "reasonably certain" or "probable."<sup>5</sup> Finally, the modifier may be dropped completely, a solution termed "the Montreal formulation" by the Commission's Reporter.<sup>6</sup>

This Comment is limited to a discussion of which modifier, if any, the Commission should elect for Rule 1.6(b)(1), but there are several additional issues currently under consideration by the Commission.<sup>7</sup> Among these is whether disclosure should be mandatory or remain permissive.<sup>8</sup> "As a purely ethical matter, under Rule 1.6 as promulgated by the ABA, there is no mandatory disclosure of a client confidence even to prevent a death; disclosure is merely permissible. Several states, however, weigh the competing policies differently."<sup>9</sup> This issue is closely related to but not entirely dependent upon the choice of a modifier.

This Comment provides a general overview of the use of "imminent" in Rule 1.6(b)(1) and presents the Commission's most recent view of the use of this modifier as well as the Reporter's suggestion.<sup>10</sup> In addition, a brief look at criticisms of "imminent" is provided<sup>11</sup> along with reference to

<sup>4</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 Reporter's Observations (A)(2) (Proposed Rule Draft No. 5, 1998).

<sup>5</sup> See *id.* Rule 1.6 Reporter's Observations (A)(2)(b), (c). Note that as of March 23, 1999, the Commission has drafted the rule using "reasonably certain" rather than "imminent" or this Comment's recommendation of no modifier at all. See Center for Professional Responsibility, *Proposed Rule 1.6-Public Discussion Draft* (visited May 26, 1999) <<http://www.abanet.org/cpr/e2k/rule16draft.html>>

<sup>6</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 Reporter's Observations (A)(2)(d).

<sup>7</sup> See *id.* Rule 1.6 Reporter's Observations.

<sup>8</sup> See, e.g., *Professional Responsibility Notes*, ARMY LAW., Dec. 1994, at 54, 55. According to the Department of the Army, [w]hen an army lawyer learns that a client intends serious prospective criminal conduct Army Rule 1.6(b) *requires* disclosure of that information.

Army Rule 1.6 differs from the American Bar Association (ABA) Model Rule after which it was generally patterned:

Army Rule 1.6 attempts to resolve this dilemma [between prevention of harm and protection of the client] by removing discretion and mandating disclosure

*Id.*

<sup>9</sup> [Manual] Laws. Man. on Prof. Conduct (ABA/BNA) 55:903 (Mar. 24, 1993).

<sup>10</sup> See *infra* notes 15-29 and accompanying text.

<sup>11</sup> See *infra* noted 30-42 and accompanying text.

the treatment of Rule 1.6 by state legislatures.<sup>12</sup> Finally, a review of the Montreal formulation is offered along with the author's recommendation to adopt this formulation.<sup>13</sup>

The reader should note that this Comment focuses largely on the use of "imminent" versus the use of no modifier at all as seen in the Montreal formulation. The Ethics 2000 Commission, however, has most recently decided to use "reasonably certain" as the modifier in Rule 1.6(b)(1).<sup>14</sup> Despite this decision, the observations and suggestions herein still help illuminate the debate. They may also help state bar associations consider the implications of adopting or rejecting the Model Rules' new approach. Finally, these issues are likely to arise again in the future, bringing renewed relevance to the content of this Comment.

#### I. COMMISSION SAYS "KEEP 'IMMINENT' OR 'REASONABLY CERTAIN' "

At its 1998 Montreal meeting,<sup>15</sup> the Commission tentatively approved a revision to Rule 1.6(b)(1) now known as "the Montreal formulation."<sup>16</sup> This formulation reads: "(b) 'the lawyer may disclose to the extent the lawyer reasonably believes necessary (1) to prevent death or substantial bodily harm.'"<sup>17</sup> The comment to this provision would then state: "Disclosure is reasonably necessary to prevent death or substantial bodily harm not only if the injury is imminent, but also if there is a present and substantial threat that a person will suffer such injury at a later date."<sup>18</sup>

The Reporter prefers the Montreal formulation to the alternative proposed modifiers or the existing "imminent" language.<sup>19</sup> According to the Reporter, the

Comment works quite well as an explanation of the requirement that the lawyer reasonably believe that disclosure is "necessary" to prevent death

---

<sup>12</sup> See *infra* notes 43-66 and accompanying text.

<sup>13</sup> See *infra* notes 67-102 and accompanying text.

<sup>14</sup> See Center for Professional Responsibility, *Proposed Rule 1.6—Public Discussion Draft* (visited May 26, 1999) <<http://www.abanet.org/cpr/e2k/rule16draft.html>>

<sup>15</sup> Montreal, Que., May 30-31, 1998.

<sup>16</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 Reporter's Observations (A)(2)(d) (Proposed Rule Draft No. 5, 1998).

<sup>17</sup> *Id.* (quoting proposed modification).

<sup>18</sup> *Id.*

<sup>19</sup> See *id.*

or substantial bodily harm. This suggests that there may be no need to add an adjective to modify the Rule's reference to death or substantial bodily harm. To the extent additional commentary is needed to explain nuances, such commentary can be tied to the Rule's requirement that the disclosure be necessary.<sup>20</sup>

Subsequently, the Reporter explained:

Given the primacy of life and bodily integrity, the Reporter recommends the adoption of the formulation approved in Montreal—a terse grant of permission to a lawyer to reveal client information to the extent the lawyer “reasonably believes necessary” to prevent death or substantial bodily harm, with resort to commentary to the extent necessary to convey the message that the lawyer must be careful not to jump to premature conclusions, but that the lawyer need not wait until the last possible moment before taking preventive action.<sup>21</sup>

The Commission approved replacing the imminence requirement with the Montreal formulation at the Montreal meeting, but the Commission revisited Rule 1.6(b)(1) during its later Toronto meeting.<sup>22</sup> At the Toronto meeting, the Commission voted to retain the Model Rule requirement of imminent death or substantial bodily harm.<sup>23</sup> The Commission also sought to add to the rule a comment “indicat[ing] that the ‘imminence’ requirement does not mean that the lawyer has to wait until death is at the doorstep.”<sup>24</sup> According to the Reporter's Observations, this defining comment might read: “Death or substantial bodily harm is imminent not only if it will be suffered immediately, but also if there [is] a present and substantial threat that a person will suffer such injury at a later date.”<sup>25</sup> As alternatives to “imminent,” modifiers such as “reasonably certain”<sup>26</sup> or

---

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* Rule 1.6 Reporter's Observations (A)(2).

<sup>22</sup> Toronto, Ont., July 31-Aug. 1, 1998.

<sup>23</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 Reporter's Observations (A)(2).

<sup>24</sup> *Id.* Rule 1.6 Reporter's Observations (A)(2)(a).

<sup>25</sup> *Id.* Rule 1.6 Reporter's Observations (A)(2)(d).

<sup>26</sup> The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 117A (Proposed Final Draft No. 2, 1998), uses “reasonably certain” as the modifier to “death or serious bodily harm.” It reads, “(1) A lawyer may use or disclose confidential client information when and to the extent that the lawyer reasonably believes such use or disclosure is necessary to prevent reasonably certain death or serious bodily harm to a person.” *Id.* Determining what is “reasonably certain” death or bodily harm may be a difficult task, as indicated in the existing comments

“probable” could be substituted. The language of the comment would remain the same, however, with “imminent” simply being replaced by either “reasonably certain” or “probable.”<sup>27</sup>

At its meeting in Chicago in September 1998,<sup>28</sup> the Commission then decided to replace “imminent” with “reasonably certain.”<sup>29</sup> This permutation is still in place so that a lawyer may reveal confidential information to prevent “reasonable certain death or substantial bodily harm.”

## II. PROBLEMS WITH “IMMINENT”

There are several concerns surrounding the use of “imminent” in Rule 1.6(b)(1). One major concern arises from the proposed comment. Although the suggested comment is similar to that used in the *Restatement of the Law Governing Lawyers*, the Reporter stated that this language “bears no resemblance to the standard dictionary definition of ‘imminent’ as ‘likely to occur at any moment.’”<sup>30</sup> The Reporter recommends against using this language to explain imminence.

Other legal commentators agree. According to Richard A. Zitrin of Zitrin & Mastromonaco in San Francisco, the imminence requirement should be changed to “inevitable.”<sup>31</sup> Zitrin believes that “‘imminent’ focuses too much on acts by individuals and that ‘inevitable’ would better cover the more likely scenario of a lawyer who learns that a toxic waste dump will eventually cause illness or death to those on nearby property.”<sup>32</sup> Commission member Seth Rosner suggested that “inevitable” be added to “imminent” rather than replacing it.<sup>33</sup>

---

to the Model Rules of Professional Conduct Rule 1.6: “It is very difficult for a lawyer to ‘know’ when such a heinous purpose will actually be carried out, for the client may have a change of mind.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. (1998).

<sup>27</sup> See *id.* Rule 1.6 Reporter’s Observations (A)(2)(a)-(c) (Proposed Rule Draft No. 5, 1998).

<sup>28</sup> Chicago, Ill., Sept. 27-28, 1998.

<sup>29</sup> See Center for Professional Responsibility, *Ethics 2000 Meeting Minutes* (visited May 13, 1999) <<http://www.abanet.org/cpr/e2k/092798mtg.html>>

<sup>30</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 Reporter’s Observations (A)(2)(a) (Proposed Rule Draft No. 5, 1998).

<sup>31</sup> See *Ethics 2000 Commission Hears Plenty of Suggestions for Reforming Model Rules*, [14 Current Reports] *Laws. Man. on Prof. Conduct* (ABA/BNA) 262, 262 (June 10, 1998).

<sup>32</sup> *Id.*

<sup>33</sup> See *id.* at 262-63.

Imminent, inevitable, reasonably certain, probable—what is all the fuss? According to Professor Roger C. Cramton of Cornell Law School, the current model rule, which uses “imminent,” is a “scandal to the profession.”<sup>34</sup> He referred to the rule as “an ‘embarrassment’ to law professors who must try to explain and justify it to students.”<sup>35</sup> Furthermore, the current Rule 1.6 is “‘just plain wrong.’”<sup>36</sup>

Among Cramton’s criticisms of the rule is that it “provides insufficient protection ‘to human life and bodily integrity’ through the rule’s narrow exceptions for disclosure.”<sup>37</sup> Professor Cramton is not alone. At the first public hearing of the Commission, held at the Montreal meeting, fourteen speakers presented the Commission with recommendations for changes to the Model Rules and comments.<sup>38</sup> Among these recommendations was Professor Cramton’s straightforward proposal for Rule 1.6: a lawyer may reveal confidential information “to prevent death or substantial bodily harm.”<sup>39</sup> Others suggested that the Commission consider the formulation used in the American Law Institute’s *Restatement of the Law Governing Lawyers* (“*Restatement*”).<sup>40</sup> According to section 117A(1) of the *Restatement*, “a lawyer may disclose confidential client information . . . to prevent reasonably certain death or serious bodily harm to a person.”<sup>41</sup> This is in fact essentially what the Commission did in Chicago<sup>42</sup> and may result in a workable compromise between “imminent” and the possibility of no modifier as suggested by Cramton and reflected in the Montreal formulation.

### III. DO WHAT THE STATES WANT

According to commentary in the *ABA/BNA Lawyers’ Manual on Professional Conduct*, “Rule 1.6 as it was approved by the ABA House of Delegates in 1983 proved to be perhaps the least popular measure in the original Model Rules; very few states adopted the ABA’s suggested

---

<sup>34</sup> *Id.* at 262 (quoting Cramton’s written proposal).

<sup>35</sup> *Id.* (quoting Cramton’s written proposal).

<sup>36</sup> *Id.* (quoting Cramton’s written proposal).

<sup>37</sup> *Id.* (quoting Cramton’s written proposal).

<sup>38</sup> *See id.* at 264.

<sup>39</sup> *Id.* This is the same as the formulation adopted at the Commission’s Montreal meeting but later rejected.

<sup>40</sup> *See id.*

<sup>41</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 117A (Proposed Final Draft No. 2, 1998).

<sup>42</sup> *See supra* text accompanying notes 28-29.

language.”<sup>43</sup> As the *Lawyers’ Manual* indicates, “[o]ne consequence of the states’ rejection of the model rule is a lack of uniformity among the jurisdictions as to what information lawyers must keep inviolate and what information may—or must—be revealed.”<sup>44</sup> The *Lawyers’ Manual* also says:

Of the jurisdictions that have adopted ethics rules based to some degree upon the ABA Model Rules, well over half have amended Rule 1.6 so as to modify the lawyer’s obligations concerning confidentiality.

The major points of difference are whether disclosure should be required rather than merely permitted, to prevent a client from committing a crime; whether the “crime prevention” exception should extend to all crimes or only to those likely to result in death or serious bodily harm; whether the “crime prevention” exception should also extend to frauds; and whether disclosure should be permitted to rectify the consequences of a client’s crime or fraud.<sup>45</sup>

At least nineteen states permit or mandate lawyers to disclose confidential information to prevent a crime.<sup>46</sup> For example, Virginia lawyers “must reveal a client’s intention to commit a crime, but they must first warn the client that they have this duty to disclose and urge the client to abandon his plans.”<sup>47</sup> Arizona lawyers are permitted to disclose “absent client consent, a client’s intent to commit a crime and the information necessary to prevent the crime.”<sup>48</sup> The same is true for lawyers in Minnesota,<sup>49</sup> Washington,<sup>50</sup> North and South Carolina, Arkansas,<sup>51</sup> and Colorado.<sup>52</sup>

Idaho lawyers are permitted to disclose information “to prevent a client from committing any crime [as well as] to disclose a client’s intention to commit a crime.”<sup>53</sup> Maryland’s rule permits a lawyer to “reveal otherwise confidential information if the lawyer believes it necessary to do so to

---

<sup>43</sup> *Ethics 2000 Commission Hears Plenty of Suggestions for Reforming Model Rules*, *supra* note 31, at 262.

<sup>44</sup> *Id.*

<sup>45</sup> [Manual] *Laws. Man. on Prof. Conduct* (ABA/BNA) 55:104 (Jan. 27, 1993).

<sup>46</sup> *See id.* at 01:11-01:49 (Jan. 21, 1987-Aug. 20, 1997).

<sup>47</sup> *Id.* at 01.11.

<sup>48</sup> *Id.* at 01.14.

<sup>49</sup> *See id.* at 01:15.

<sup>50</sup> *See id.* at 01:16.

<sup>51</sup> *See id.* at 01.18-01.19, 01:32-01:33.

<sup>52</sup> *See id.* at 01:42.

<sup>53</sup> *Id.* at 01:22-01:23.



prevent a client from committing a criminal or fraudulent act that would result in death, substantial bodily injury, or substantial injury to the financial interests or property of another.”<sup>54</sup> Hawaii has an even broader rule greatly expanding opportunities for disclosure.<sup>55</sup>

Florida lawyers are required “to disclose confidential information to prevent a client from committing a crime or to prevent death or substantial bodily harm.”<sup>56</sup> The same is true for Texas and Illinois lawyers.<sup>57</sup> “Indiana’s confidentiality rule retains the predecessor Model Code provision permitting disclosure of confidential information to prevent a client from committing any criminal act.”<sup>58</sup> Mississippi permits lawyers to disclose “information to prevent a client from committing any crime.”<sup>59</sup>

---

<sup>54</sup> *Id.* at 01:20. “In addition, the Maryland rule permits disclosure to allow a lawyer to rectify the consequences of a criminal or fraudulent act in which the lawyer’s services have been used.” *Id.*

<sup>55</sup> Hawaii’s rule allows for disclosure in many situations including:

(1) prevention of fraud likely to result in death or substantial bodily harm; (2) prevention of substantial injury to another’s financial interests or property; (3) rectification of a client’s criminal or fraudulent act in the furtherance of which the lawyer’s services were used; (4) establishment of a defense to a disciplinary complaint against the lawyer based upon the client’s conduct; (5) prevention of a public official or public agency from committing a criminal or illegal act that a government lawyer reasonably believes is likely to result in harm to the public good; (6) rectification of the consequence of a public official’s or public agency’s act that the government lawyer reasonably believes to have been criminal or illegal and harmful to the public good; and (7) compliance with other law or court order.

*Id.* at 01:45.

<sup>56</sup> *Id.* at 01:22.

<sup>57</sup> See *id.* at 01:30-01:31, 01:33-01:35. However,

[i]f a Texas lawyer has information clearly establishing that a client is likely to commit a criminal or fraudulent act likely to result in substantial injury to someone’s financial or property interests, whistle-blowing is not mandated. The lawyer’s only obligation is to make reasonable efforts either to dissuade his clients from performing the act or persuade the client to take corrective action for committed acts.

*Id.* at 01:31. In Illinois, lawyers are permitted to “reveal client confidences or secrets when required by law or court order or when they involve a client’s intent to commit a crime other than acts resulting in death or serious bodily harm.” *Id.* at 01:34.

<sup>58</sup> *Id.* at 01:23.

<sup>59</sup> *Id.* at 01:24.

The same is true for Kansas, Oklahoma, and West Virginia.<sup>60</sup> The Kansas rule also permits lawyers to disclose “to comply with the requirement of law or the orders of any tribunal.”<sup>61</sup>

Michigan retains “confidences” and “secrets” from the Model Code and “permits a lawyer to disclose confidences and secrets to prevent a client from committing a crime and to rectify the consequences of a client’s illegal or fraudulent act in the furtherance of which the lawyer’s services were used.”<sup>62</sup> There is no rule similar to 1.6(b)(1) regarding confidentiality in California, though California lawyers have a duty “to maintain client confidences and secrets.”<sup>63</sup> The District of Columbia also retains this language.<sup>64</sup>

As one commentator points out, “at least thirty-five states have adopted the Model Rules, [but] only a relative handful of states have adopted the precise position of the Model Rules regarding confidentiality.”<sup>65</sup> Of the states that have adopted Rule 1.6, at least nineteen states do not use a modifier, such as “imminent,” for death or bodily harm.<sup>66</sup> When adopting the Model Rules, the states clearly did not want a modifier. The Montreal formulation thus reflects the states’ treatment of disclosure of death or bodily harm.

#### IV THE MONTREAL FORMULATION

According to *Black’s Law Dictionary*, “confidential” is defined as “[i]ntrusted with the confidence of another or with his secret affairs or

---

<sup>60</sup> See *id.* at 01:27-01:29.

<sup>61</sup> *Id.* at 01:28.

<sup>62</sup> *Id.* at 01:29.

<sup>63</sup> *Id.* at 01:30.

<sup>64</sup> The District of Columbia

allows a lawyer to reveal client confidences and secrets when reasonably necessary to prevent bribery or intimidation of witnesses, jurors, court officials, or others involved in a legal proceeding. Another provision, designed specifically for the D.C. Bar’s large government-lawyer membership, defines such lawyers’ client as the employing agency and permits such lawyers to reveal confidences when authorized by law. The district also adds a new provision requiring lawyers to exercise reasonable care to prevent employees, associates, and others whose services are used by lawyers from revealing client confidences.

*Id.* at 01:36.

<sup>65</sup> Lewis Becker, *Ethical Concerns in Negotiating Family Law Agreements*, 30 FAM. L.Q. 587, 605 (1996).

<sup>66</sup> See *supra* notes 46-61 and accompanying text.

purposes; intended to be held in confidence or kept secret; done in confidence.”<sup>67</sup> Disclosure, as governed by Rule 1.6, involves a delicate balancing of client confidentiality with the duties of the attorney as a member of society. The comment to the current Rule 1.6 states, “A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.”<sup>68</sup> However, the comment also succinctly says that “[t]he lawyer is part of a judicial system charged with upholding the law.”<sup>69</sup> Lawyers are not just muted figureheads, nodding in approval or disapproval to what a client confides. There are limits to this bargained-for silence.

The Montreal formulation, as discussed above, proposes to disregard the use of “imminent” to modify the phrase “death or substantial bodily harm.”<sup>70</sup> The Montreal formulation would state that a “lawyer may disclose [confidential information] to the extent the lawyer reasonably believes necessary to prevent death or substantial bodily harm.”<sup>71</sup>

This formulation would address the concerns of some commentators. Former ABA President N. Lee Cooper observed that “professionalism has not always depended on external regulation and rules. More introspection and a broader sense of ethics and professionalism must be encouraged to maintain the bar’s system of internal regulation and stem the potential for ‘creeping outside regulation’ of the legal profession.”<sup>72</sup> Furthermore, according to Heidi Li Feldman, a University of Michigan Law School professor, “the Model Rules’ black-letter listing of prohibitions and permissions encourages lawyers to use the ethics code as an aid to create defensible legal arguments for the desired position or result.”<sup>73</sup> Feldman condemned this as “‘technocratic lawyering,’” and would like to see a

---

<sup>67</sup> BLACK’S LAW DICTIONARY 297 (6th ed. 1990).

<sup>68</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. (1998).

<sup>69</sup> *Id.*

<sup>70</sup> See *id.* Rule 1.6 Reporter’s Observations (A)(2)(d) (Proposed Rule Draft No. 5, 1998).

<sup>71</sup> *Id.*

<sup>72</sup> *ABA Speakers Debate Proposals for Reshaping Ethics Rules*, [13 Current Reports] *Laws. Man. on Prof. Conduct* (ABA/BNA) 158 (June 11, 1997). See Gila M. Tuoni, *Society Versus the Lawyers: The Strange Hierarchy of Protections of the ‘New’ Client Confidentiality*, 8 ST. JOHN’S J. LEGAL COMMENT. 439 (1993), for a detailed history of client confidentiality and the legal profession.

<sup>73</sup> *ABA Speakers Debate Proposals for Reshaping Ethics Rules*, *supra* note 72, at 159.

return to "aspirational standards and ethical considerations such as [those contained in] the Model Code."<sup>74</sup> Carrie Menkel-Meadow, a Georgetown University Law Center professor, argued that "the Model Code, the Model Rules, and the forthcoming *Restatement* focus too much on a lawyer's role as a representative of the client and too little on a lawyer's alternative roles, such as problem solver, peace maker, and social worker."<sup>75</sup> Finally, Monroe Freedman, professor of legal ethics at Hofstra University Law School, has observed that Rule 1.6 precludes a lawyer from disclosing information "to prevent injury or death that is not imminent."<sup>76</sup> He concluded that lawyers should be permitted to divulge this information and proposed to the American Law Institute an amendment to the *Restatement's* section 117A to delete the imminent requirement.<sup>77</sup>

By deleting the "imminent" requirement, the Commission would broaden the disclosure rule, thereby giving lawyers more discretion. As previously noted, many states modified Rule 1.6 in their adoption of the rule. At least nineteen states opted for a broader rule—one that permits lawyers to disclose confidential information to prevent a crime, not just "imminent" ones.<sup>78</sup> Thus the current Model Rule 1.6 is ineffective as a "model." A more effective "model" rule would be one that is broad and can then be limited as necessary. The Montreal formulation permits disclosure to prevent death or substantial bodily harm.<sup>79</sup> This should be the "model" rule—the recommendation of the ABA. A state could then work from this basic rule, adapting the rule to read "imminent," "reasonably certain," "probable," "likely," or otherwise as it finds necessary.

Affording lawyers this broad discretion does not mean that the role of the lawyer will cross into that of policing. Lawyers should be able to give effective legal counsel while retaining their place in society as persons concerned with the prevention of crime.<sup>80</sup> If the ABA retains the immi-

---

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 161.

<sup>77</sup> See *id.* The American Law Institute approved his changes. See *id.*

<sup>78</sup> See [Manual] Laws. Man. on Prof. Conduct (ABA/BNA) 55:104 (Jan. 27, 1993).

<sup>79</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 Reporter's Observations (A)(2)(d) (Proposed Rule Draft No. 5 1998).

<sup>80</sup> See Marianne M. Jennings, Forum, *The Model Rules and the Code of Professional Responsibility Have Absolutely Nothing To Do with Ethics: The Wally Cleaver Proposition as an Alternative*, 1996 WIS. L. REV. 1223, for a humorous and articulate discussion of simplifying the Model Rules. Jennings states, "I believe we have graduated from craft ethics to crafty ethics. Somehow I envisioned the

nence requirement, thereby restricting a lawyer's discretion to disclose, will lawyers retain a sense of civil and ethical duty to society to protect its members?<sup>81</sup> If a lawyer does reveal confidential information for the better of society, at what cost to the lawyer? If she doesn't, what is the cost?

This is not to say that lawyers will have unbridled discretion should the Commission adopt the Montreal formulation. Lawyers will still be limited to disclosure they reasonably believe is necessary.<sup>82</sup> As the Reporter stated, "[W]e should, if at all possible, restrict our use of 'reasonable' or 'reasonably' to situations in which we want to require the lawyer to act as would a prudent and competent lawyer."<sup>83</sup> While lawyers may be able to assign limits to what a reasonable belief is, lawyers are often faced with the decision to disclose and face malpractice liability or not disclose and fail to prevent a crime. Commentary in the *ABA/BNA Lawyer's Manual on Professional Conduct* states:

While in theory a lawyer may find himself or herself in trouble for violating a client's confidence, the reported decisions suggest that in practice, it is the lawyer who treats the principle of confidentiality as absolute who is more likely to wind up answering for the consequences.

---

practice of law as something a bit more noble than seeing how much I could get away with. Can we move to a higher standard than how much can we get away with?" *Id.* at 1227

<sup>81</sup> See Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901 (1995), for a good discussion of morality and legality.

<sup>82</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 117A cmt. g (Proposed Final Draft No. 2, 1998) ("Subsequent re-examination of the reasonableness of a lawyer's action in the light of later developments would be unwarranted; reasonableness of the lawyer's belief at the time and under the circumstances in which the lawyer acts is alone controlling."). At the same time, comment [18] to the Commission's fifth proposed draft of Rule 1.6

is new and attempts to specify some of the steps a lawyer may have to take before he or she can reasonably believe that disclosure is necessary to accomplish one of the purposes specified in paragraphs (b)(1)-(5). This Comment takes the place of sentences that have been deleted from the Model Rule counterparts to proposed Comments [16][17] and [19].

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 Reporter's Observations (B) cmt. [18]; see also *id.* Rule 1.6 Reporter's Observations (B) cmt. [13], [14].

<sup>83</sup> *Id.* Rule 1.6 Reporter's Observations (A)(2)(b) (discussing "reasonable" and "reasonably" in the context of the "reasonably certain" alternative discussion).

Depending upon the context and the specifics, lawyers face anything from vacatur of orders entered by the court before which the lawyer's silence amounted to a misrepresentation, to discipline, to contempt, to damage liability for fraud, including primary or secondary liability for securities fraud, to accessory criminal liability, to criminal misconduct charges.<sup>84</sup>

When faced with the choice of breaching client confidentiality or facing criminal liability, what is a lawyer to do? As Comment g to section 117A of the *Restatement* states, "Critical facts may be unclear, emotions may be high, and little time may be available in which the lawyer must decide on an appropriate course of action."<sup>85</sup> One interesting issue that arises is a lawyer's duty to disclose to prevent death or bodily harm when a client expresses intent to commit suicide.<sup>86</sup> According to a Utah ethics opinion, "[i]f it is in the best interests of a client, an attorney who reasonably believes the client is contemplating imminent suicide may disclose a suicide threat to another who may help prevent it."<sup>87</sup> Of what significance is it to limit disclosure of threat of suicide to "imminent" suicide? If intent to commit suicide should be disclosed because the lawyer may be the only one who knows of it, why must the suicide be "imminent"? Would not the policy behind such permitted disclosure be better served if the threatened suicidal act were far enough in the future that medical treatment could be sought?

Legal scholar George W. Overton has commented as follows on an additional issue in the suicide scenario:

[Illinois] Rule 1.6(b) says "A lawyer shall reveal information about a client to prevent the client from committing an act that would result in death." The drafters of the Illinois Rules presumably never thought about whose death would be involved and assumed it would be someone else's death. If the lawyer should reveal the communication (e.g., to the client's spouse), will the lawyer have a defense against the client's charge

---

<sup>84</sup> [Manual] Laws. Man. on Prof. Conduct (ABA/BNA) 55:110 (Jan. 27, 1993).

<sup>85</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 117A cmt. g.

<sup>86</sup> See generally Kimberly A. Gough, Note, *The Conflict Between Confidentiality and Disclosure When a Client Announces Suicidal Intentions: A Proposed Amendment to the Model Ethics Codes*, 40 WAYNE L. REV. 1629 (1994) (examining a lawyer's dilemma of whether to disclose or not disclose that his or her client is contemplating suicide).

<sup>87</sup> Utah State Bar Ethics Advisory Opinion Comm., Op. 95 (1989).

of a disciplinary violation? Threats of suicide, talk of it, etc., may often reflect transitory emotional crises. In other words, there may be a living a client who can complain about disclosure.<sup>88</sup>

Overton concludes, "ABA Model Rule 1.6 differs substantially, and permits lawyer disclosure only to prevent criminal acts of the client 'likely to result in imminent death: one's own suicide is not one's own crime.'"<sup>89</sup>

If the Montreal formulation—disclosure permitted to prevent death or substantial bodily harm—is adopted, will this extend to cases of physician-assisted suicide?<sup>90</sup> In such cases, the client might tell his lawyer that he desires to end his suffering through physician-assisted suicide. In some cases, the lawyer should probably disclose the intent to commit suicide. Special issues arise when the suicide is physician-assisted in that the suicide may not be "imminent" under the current rule.<sup>91</sup> If the Commission adopts the Montreal formulation, however, the timing of the suicide is not an issue. The policy of getting the client sufficient medical treatment and preventing death can be served.

Other troubling issues arise when the client's conduct is illegal, as in the case of child abuse, but the lawyer does not have an obligation to disclose under ethics rules.<sup>92</sup> For example, a North Carolina ethics opinion

---

<sup>88</sup> George W. Overton, *The Suicidal Client*, CBA REC., Sept. 1994, at 46.

<sup>89</sup> *Id.*

<sup>90</sup> See generally Yale Kamisar, *Physician Assisted Suicide: The Problems Presented by the Compelling, Heartwrenching Case*, 88 J. CRIM. L. & CRIMINOLOGY 1121 (1998).

<sup>91</sup> One illustration of this is the broadcasting of a man's suicide, assisted by Dr. Jack Kevorkian, on the CBS newsmagazine show, *60 Minutes*. See "*60 Minutes*" Follows Up Suicide Show, ASSOCIATED PRESS (Mar. 1, 1999), available in 1999 WL 12934485. Given the planning and media coordination involved to air this suicide, was it "imminent"?

What if physician-assisted suicide is not illegal? On what basis should the lawyer disclose? Currently, 36 states have enacted laws banning assisted suicide. One state, Oregon, has legalized the practice for terminally ill patients. See Daniel LeDuc, *Maryland Senate Votes to Ban Assisted Suicide*, WASH. POST, Mar. 4, 1999, at B2. The issue of disclosure in such a situation remains unresolved.

<sup>92</sup> Many states have enacted mandatory legal disclosure statutes apart from ethics rules requiring disclosure to the police or social services suspicions of child abuse. For example, Kentucky law provides:

Any person who knows or has reasonable cause to believe that a child is dependent, neglected, or abused shall immediately cause an oral or written report to be made to a local law enforcement agency or the Kentucky state

held "that a lawyer who learns that his clients' minor children are victims of continuing abuse is not required by ethics rules to report the abuse, although failing to report may subject the lawyer to criminal prosecution under a state reporting statute."<sup>93</sup> In Massachusetts,

a lawyer who had represented a camp counselor in a case involving indecent assault upon young children learned the former client had completed probation and was working at a children's camp. The committee ruled that if the lawyer believed that the client was reasonably likely to commit a further offense, and if the lawyer could not persuade the former client to make the disclosure himself, then the lawyer was free to discuss the matter with the camp or the authorities.<sup>94</sup>

Another approach is that taken by Kentucky, which "adds an exception [to the confidentiality rule] that gives a lawyer the discretion to reveal information necessary to comply with other laws or court orders."<sup>95</sup>

In his observations, the Commission's Reporter highlights concerns regarding disclosure of child sexual abuse as well as certain diseases. Specifically, the Reporter presents two questions for the Commission's review: "Should substantial bodily harm be explained as including 'the

---

police; the cabinet or its designated representative; the commonwealth's attorney or the county attorney; by telephone or otherwise. Nothing in this section shall relieve individuals for their obligations to report.

KY. REV. STAT. ANN. § 620.030(1) (Michie 1990). For a good overview of the problem of child abuse and the balancing of child abuse reporting laws with attorney-client confidences, see Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203 (1992). See generally Robin A. Rosencrantz, Note, *Rejecting "Hear No Evil Speak No Evil" Expanding the Attorney's Role In Child Abuse Reporting*, 8 GEO. J. LEGAL ETHICS 327 (1995).

See also Utah State Bar Ethics Advisory Opinion Comm., Op. 97-12 (1998) (opining that a lawyer does not violate ethical rules if the lawyer does not report child abuse, although required by law, when the lawyer learned of abuse from a client who refuses to consent to disclosure); Pa. Bar Ass'n Comm. on Legal Ethics and Professional Responsibility, Informal Op. 94-111 (1994) (stating that the lawyer probably does not have an obligation to reveal knowledge of child abuse).

<sup>93</sup> [Manual] Laws. Man. on Prof. Conduct (ABA/BNA) 55:904 (Mar. 24, 1993) (citing North Carolina Bar Ass'n, Op. 120 (1992)).

<sup>94</sup> *Id.* at 55:905 (citing Massachusetts Ethics Op. 1990-2 (1990)).

<sup>95</sup> [Manual] Laws. Man. on Prof. Conduct (ABA/BNA) 01:31 (Mar. 28, 1990); see KY. SUP. CT. R. 3.130-1.6(b)(3).



consequences of child sexual abuse?"<sup>96</sup> "Should substantial bodily harm be explained as including 'life threatening and debilitating illness, such as cancer and AIDS'?"<sup>97</sup>

If "substantial bodily harm" is expanded to include child abuse and certain diseases, how does the choice of modifier affect what may or must be disclosed to prevent such harm? "Imminent" as defined by *Black's Law Dictionary* means "[n]ear at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous"<sup>98</sup> In contrast, the Reporter suggests that the proposed comment, which would define "imminent" as used in Rule 1.6,<sup>99</sup> "is consistent with Comment *d* to § 117A of the Restatement of the Law Governing Lawyers that serves as an explanation of the Restatement's requirement that the death or bodily harm be 'reasonably certain.'"<sup>100</sup> Furthermore, the Reporter asserts that "[t]he problem with this comment language is that it bears no resemblance to the standard dictionary definition of 'imminent' as 'likely to occur at any moment.'"<sup>101</sup> Based on *Black's Legal Dictionary*, if the imminence requirement is retained, a lawyer would have to determine whether the abuse or disease is "impending" or "threatening." This may be difficult to ascertain—when future abuse is likely to occur or when diseases, such as cancer or AIDS, will be manifested. If the Montreal formulation is adopted, this problem is eliminated. Lawyers will be afforded greater discretion regarding disclosure. Thus, if a lawyer knows that his client has abused a child in the past, the lawyer may use his discretion to disclose information under the ethical

---

<sup>96</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 Reporter's Observations (B) cmt. [13] (Proposed Rule Draft No. 5, 1998). The Reporter noted that "[c]omment *c* to section 117A of The Restatement includes 'the consequences of events such as child sexual abuse' within the meaning of 'serious bodily harm.'" *Id.* Note that the Reporter "drafted [Comment [13]] on the assumption that the Rule will permit disclosure to prevent 'probable' death or substantial bodily harm." *Id.*

<sup>97</sup> *Id.* The Reporter noted that "[c]omment *c* to § 117A of The Restatement includes 'life-threatening illness' within the meaning of 'serious bodily harm.'" *Id.* For a discussion of current legal issues concerning AIDS, see Rhonda R. Rivera, *Lawyers, Client, and AIDS: Some Notes from the Trenches*, 49 OHIO ST. L.J. 883 (1989).

<sup>98</sup> BLACK'S LAW DICTIONARY 750 (6th ed. 1990).

<sup>99</sup> See *supra* text accompanying note 25.

<sup>100</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 Reporter's Observations (A)(2)(a).

<sup>101</sup> *Id.*

rules to prevent future abuse regardless of his belief of when such future abuse may occur. The same holds true for infectious or fatal diseases.

### CONCLUSION

The Montreal formulation simply makes sense. To the extent that lawyers are a self-governing body, any “model” rule proposed by representatives of that body should reflect what its constituents want and what they are likely to approve. The former Rule 1.6, using “imminent,” has proved to be unworkable through alterations by most states. If the Commission had adopted the Montreal formulation for Rule 1.6, it would have achieved a new, more workable approach without completely abandoning the old. By adopting the Montreal formulation, the Commission also would have drafted a “model” rule consistent with the interpretation of at least nineteen states.

The Reporter suggested that the comment to the Montreal formulation read: “Disclosure is reasonably necessary to prevent death or substantial bodily harm not only if the injury is imminent, but also if there is a present and substantial threat that a person will suffer such injury at a later date.”<sup>102</sup> With this comment, the Commission would have retained the concept of imminence in guiding lawyer’s discretion under the Montreal formulation. Despite its apparent rejection, the Montreal formulation is the best revision for Rule 1.6 because it offers a simple, clear guide for lawyers in using their discretion to disclose or not disclose confidential information in the wide array of real-life situations lawyers face.

---

<sup>102</sup> *Id.* Rule 1.6 Reporter’s Observations (A)(2)(d).

